APPEAL NO. 93134

A contested case hearing was held in (city), Texas, on January 29, 1993, with (hearing officer) presiding as hearing officer. The hearing officer determined that the claimant, Mr B, who is the appellant, did not sustain a compensable injury because his injury arose out of the acts of a third person intended to injure him for personal reasons not related to employment, and that the carrier was therefore not liable for his injuries.

The claimant asked that this decision be reversed, arguing that the exception does not apply because the claimant and the person with whom he was involved in an altercation did not know each other outside of work. Essentially, the claimant argues that the injury arose out of employment because that is where he was injured and the only place he knew his coworker. The carrier asks that the decision be upheld.

DECISION

We affirm the determination of the hearing officer.

On (date of injury), the claimant, who was employed by (employer), was in the breakroom on his morning break at around 9:30 a.m. He said as he began to eat his food, another employee, who was described throughout the testimony as O[1] (Mr. O), came up behind him and began rubbing against him. When others in the room began to tease him, he realized that Mr. O was rubbing his genitals against claimant's back. The claimant stated that he asked Mr. O several times, during the events that followed, what his problem was, and asked Mr. O to leave him alone. He stated that he put his hand toward Mr. O so that he would move. The claimant testified that Mr. O became profane and insulting, calling claimant an s.o.b. and saying that he could break his mouth. Claimant stated that Mr. O then passed his hands, which claimant asserted were dirty from the restroom, over his cheeks and mouth. At this point, the claimant said that he stood up, asking again what Mr. O's problem was. When Mr. O said he could break claimant's mouth, claimant then said "okay". At this point, people in the area, including (Mr. D), a supervisor, separated the two.

Claimant said that he sat down and resumed eating, and that Mr. O purchased a soda. Mr. O then began walking around the area, telling claimant that he let his wife tell him what to do. Mr. O then, according to claimant, spit his drink on claimant. Mr. O then used a particularly aggregious profanity. Claimant said he stood up and then said, "I'm here, what are you waiting for?" and that Mr. O called him a good for nothing and hit him on the side of his face and mouth. Mr. O then threw himself on top of claimant, embracing him, and claimant fell, injuring his ankle.

On cross-examination, claimant characterized himself as either not really angry

[1] For clarification of the record, we would note that it was only the last witness, Mr D, who knew the coworker's full name, which was Mr O; the hearing officer's decision refers to him as "Mr. E," although most of the testimony refers to him as Mr O.

during this sequence of events, or as angry because Mr. O had done so many things to him in the past and he had enough. He agreed that Mr. O had insulted his dignity and pride on (date of injury). He stated that he had on at least one prior occasion had an unpleasant exchange with Mr. O, in a conversation in which Mr. O offered him money in order to sleep with his 12 year old stepdaughter. He then testified that he took this conversation as more of a joke. Claimant said that Mr. O was a prankster who didn't really like others, who did things such as smearing mashed beans on door handles. He stated that Mr. O worked in another area of the employer's business than he did. Claimant agreed that he had gotten into a fight when working for a previous employer.

Notwithstanding the claimant's equivocal testimony about his mood during the encounter, the other witnesses, including claimant's witness (Mr. H), described him as angry during this encounter and as exchanging comments with Mr. O. Mr. H described the claimant as reluctant to fight. Mr. H said that claimant fell when he was grabbed in an embrace by Mr. O. He stated that Mr. O struck the first blow but then claimant hit him the second blow. Under cross-examination, he stated that this occurred after Mr. O stroked claimant's face, whereupon claimant, who he testified was angered by the face-stroking, stood up and threw a punch, knocking Mr. O's hat off. At this point, the parties were separated. In a transcribed interview, Mr. H described Mr. O as a troublemaker, but said that claimant was not. Mr. H said that claimant and Mr. O had argued in the past, before this incident.

(Mr. L), another coworker, testified that claimant had once gotten angry with him, although it did not come to blows. He testified that after Mr. O rubbed against claimant, the parties had words. Mr. L said Mr. O told claimant that they were going to fight, claimant agreed, and they began fighting, with claimant swinging at Mr. O. He did not recall hearing claimant ask Mr. O to stop, or asking him why he was doing this.

(Mr. D) was loading a soda machine in the breakroom at the time of the incident. There were about 12-15 people in the breakroom. He heard "whooping and hollering" behind him, and turned to see Mr. O and claimant in a heated exchange. He said he walked over and told them to stop. When he began reloading the machine, he heard loud noises again, and turned around and saw Mr. O and claimant scuffling, with one party getting up. Mr. D said he did not understand Spanish so did not know the words that were exchanged. Mr. D, who was a supervisor, said both parties were disciplined for fighting.

Claimant said that he did not know Mr. O outside of work. The gist of his appeal is that because of this, the "personal animosity" exception is not applicable to this case. What we find significant, however, is the lack of any evidence that the quarrel arose from matters relating to performance of the work of either party. Indeed, the evidence unequivocally establishes that the nature of the argument leading to the fight was purely personal. Whether Mr. O was known as a prankster around the company does not elevate the incident

in question to one which arose out of the course and scope of employment. The evidence sufficiently supports the hearing officer's determinations that claimant was not injured by reason of his employment or by reason of being an employee of the employer, but as a result of verbal attacks of a personal nature.

Exceptions found in the 1989 Act at Article 8308-3.02 are substantially the same as those in the prior statute, TEX. REV. CIV. STAT. ANN., art. 8309, Section 1 (repealed 1989), especially in regard to exceptions at Section 3.02(2) and 3.02(4). The 1989 Act will be viewed as conveying the same intent in this area. Walker v. Money, 120 S.W.2d 428 (Tex. 1938).

The decision as to whether an injury is in the course of employment is ordinarily a question of fact. Orozco v. Texas General Indemnity Co., 611 S.W.2d 724 (Tex. App.-El Paso 1981, no writ). The mere fact that an injury is caused by a coemployee is not controlling on the question as to whether an injury is compensable. Shutters v. Dominoes Pizza, Inc., 795 S.W.2d 800, 802 (Tex. App.-Tyler 1990, no writ). The hearing officer is the sole judge of weight and credibility of the evidence. Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-6.34(e) (Vernon Supp. 1993) (1989 Act).

When sufficient evidence has been admitted to raise the issue that an exception applies to compensability, the burden shifts to the employee to prove it does not apply in showing that the injury arose out of and in the course and scope of employment. March v. Victoria Lloyds Ins. Co., 773 S.W.2d 785, 791 (Tex. App.-Fort Worth 1989, writ denied).

Texas Indemnity Ins. Co. v. Cheely, 232 S.W.2d 124 (Tex. Civ. App.-Amarillo 1950, writ ref'd), considered whether the "personal reasons" exception could apply to coworkers. The court found that the fight between coworkers did involve personal reasons and was not compensable. It looked to see whether their dispute pertained to the employment of either employee. Similarly Commercial Standard Ins. Co. v. Marin, 488 S.W.2d 861 (Tex. Civ. App.-San Antonio 1972, writ ref'd n.r.e.), while not involving coworkers, said an assault arises out of the employment if the risk of assault is increased because of the nature of the work, or if the reason for the assault is a quarrel having its origin in the work. *See* Texas Workers' Compensation Commission Appeal No. 91070, decided December 19, 1991; Texas Workers' Compensation Commission Appeal No. 92112, decided May 4, 1992. *Compare* Texas Workers' Compensation Commission Appeal No. 91019, decided October 3, 1991.

The case cited by claimant, Nasser v. Security Insurance Company, 724 S.W.2d 17 (Tex. 1987), while opining that the rationale for the "personal animosity" exception was to preclude liability for importation of antecedent personal disputes into the workplace, nevertheless also holds that a compensable assault must be incident to some duty of employment. For the plaintiff in that case, his duty was the responsibility to meet with

customers, one of whom injured him. Such a standard requires the trier of fact to weigh the personal aspect of an assault against the employment aspect.

In viewing the evidence in this case, we find it wholly devoid of any indication that a dispute arose out of the work done by either party for the employer. Consequently, although the evidence is sufficient to support the hearing officer's conclusion that the exception set forth in Article 8308-3.02(4) applies, we would note that the hearing officer, based upon his findings of fact, could have made the further conclusion of law that the claimant failed to prove, by a preponderance of the evidence, that he was injured in the course and scope of his employment.

The hearing officer's decision that the carrier is not liable for claimant's injury is affirmed.

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Susan M. Kelley
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.
Chief Appeals Judge

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Lynda H. Nesenholtz
Appeals Judge